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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/575,434

04/10/2006

Stefan Kunz

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1858

34704 7590 10/16/2008

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EXAMINER

MACAULEY, SHERIDAN R

ART UNIT

PAPER NUMBER

1651

MAIL DATE

DELIVERY MODE

10/16/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<p><b>Application No.</b> 10/575,434</p>	<p><b>Applicant(s)</b> KUNZ, STEFAN</p>	
	<p><b>Examiner</b> SHERIDAN R. MACAULEY</p>	<p><b>Art Unit</b> 1651</p>	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 25 September 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 1,2,4-8,10 and 15.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/Ruth A. Davis/  
Primary Examiner, Art Unit 1651

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments in the request for reconsideration filed on 25 September 2008 have been fully considered but they have not been found to be persuasive. Applicant argues that one of ordinary skill in the art would not have been motivated to combine the teachings of the cited prior art to arrive at the claimed invention because one would not have applied teachings directed to the control of white rot fungi, as discussed in the JP06256125 reference, to teachings directed to the control of fire blight, as discussed in the Siebold reference. Applicant further argues that one of ordinary skill in the art would not have been motivated to use the acidic environment recited in the claims, particularly not the formulation recited in claim 15. In response to applicant's arguments, it is noted that the motivation for combining the references has been provided in the previous office action. Specifically, one of ordinary skill in the art would have been motivated to combine the cited teachings because JP06256125 is directed to a composition comprising a fungus for administration to a plant for the treatment of a disease caused by a microorganism and Siebold teaches fungi which would be useful for the treatment of a disease caused by a microorganism. Thus, both teachings are directed to antimicrobial components that may be used in compositions for the treatment of a plant. Combining equivalents that are known to be useful for the same purpose constitutes prima facie obviousness (see MPEP 2144.06). Thus, although the teachings are directed to the treatment of different types of microbial infections, one of ordinary skill in the art would have recognized that it would have been obvious to formulate a composition for the treatment of microbial disease comprising the components taught in both references. One would have been motivated to add the various components taught by Jabar to a plant treatment composition because JP06256125 teaches the use of an organic manure, preferably a material which can easily be made into a liquid, such as animal protein in the composition for the treatment of plants (abstract). Jabar teaches that whey is a suitable source of animal protein (or peptides) for a composition for the treatment of plants (par. 24). One of ordinary skill in the art would thus have recognized that whey would be desirable for use in the composition for the treatment of plants for the prevention of microbial disease. Further, Jabar teaches that phosphates are useful in compositions for the treatment of plants because they are pH control agents (p. 3, par. 34). The use of a buffer in a composition comprising biological material, such as microorganisms, or a composition with a predetermined pH, would be a matter of routine optimization for one of ordinary skill in the art. Further, regarding claim 15, the use of the claimed pH range, the use of the spores, conidia and budding yeast cells of the fungi, and the claimed concentrations of components would all have been matters of routine experimentation to one of ordinary skill in the art. One of ordinary skill in the art would have had a reasonable expectation of success in combining the teachings discussed above to arrive at the claimed invention because the use of fungi as antagonists to prevent microbial infection of plants was known in the art, as taught by Siebold (abstract, p. 13), and all of the components of the claimed method and composition were known at the time of the invention to be suitable components in compositions for the treatment of plants, as taught by JP06256125. It would therefore have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings discussed above to arrive at the claimed invention. Thus, applicant's arguments have not been found to be persuasive.